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# Judicial Protection against Abusive Practices: Judicial Review of Legislative Investigations

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may, however, encourage those who otherwise might consider themselves quite alone in their speculations. The needs of justice are certainly not served by acquiescing in the all-too-frequently encountered attitude of hopelessness. Daily newspaper accounts convince the informed reader that something is out of balance. We will not acknowledge that the legal profession is bankrupt of the imagination to restore such balance.

*George Morris Fay*

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LEGISLATIVE INVESTIGATIONS: SAFEGUARDS FOR WITNESSES:

JUDICIAL PROTECTION AGAINST ABUSIVE PRACTICES:

JUDICIAL REVIEW OF LEGISLATIVE  
INVESTIGATIONS

The first half of this century, which has witnessed so remarkable an expansion of both congressional and state legislative action, has likewise been marked by the projection of legislative investigative power far beyond the bounds theretofore customary. Although many of these inquiries have aroused bitter controversy, they have seldom been challenged by invoking judicial review, and few such challenges have succeeded. After 1930, indeed, the opinion grew ever more general that the power of Congress to conduct investigations, in which evidence may be procured by compulsory process backed by penal sanctions, is substantially unlimited; and that judicial review of congressional investigations is largely theoretical and of small practical scope.

This attitude, nurtured during the between-war years, has by now hardened into a preconception that is having a profound and not altogether beneficial effect on the behavior alike of witnesses called before legislative investigating committees, and of the committees themselves. The fear of

investigative omnipotence, as well as more discreditable reasons, has caused witnesses by the hundred to invoke the privilege against self-incrimination. Frequently, I believe, the plea was neither legitimate nor advantageous for the witness or the cause of truth. At the same time, some committees have asserted an absolute power of inquisition, and have exhibited a most dangerous arrogance in procedural matters.

But in fact, neither the political nor the judicial history of legislative inquiries warrants these sweeping and unqualified characterizations of their powers. Last spring, the Supreme Court of the United States issued a timely reminder<sup>1</sup> that the "informing function" of Congress,<sup>2</sup> like the legislative power to which it is ancillary, is subject to constitutional limitations which are judicially enforceable. That decision, together with the current and well-nigh explosive expansion and proliferation of investigative proceedings, makes timely another glance at their history, a restatement of their place in the governmental structure, and an analysis of the scope of judicial review of their conduct.

### *The Origins of Judicial Review*

The historical roots of legislative investigations were skillfully explored and exposed by legal scholarship twenty-five years ago.<sup>3</sup> The power of Parliament to conduct inquiries, directly or through its committees, and to imprison contumacious witnesses in order to compel them to give testimony, was well recognized at least by the 17th century.<sup>4</sup> While Parliament was in session this power was absolute, and the courts would not entertain any challenge to the Parliamentary warrant of arrest.<sup>5</sup> Colonial legislatures be-

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<sup>1</sup> *United States v. Rumely*, 345 U.S. 41 (1953).

<sup>2</sup> So described in *WOODROW WILSON, CONGRESSIONAL GOVERNMENT* 303 (1901).

<sup>3</sup> Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926); Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. OF PA. L. REV. 691, 780 (1926).

<sup>4</sup> Landis, *supra* note 3, at 160-64.

<sup>5</sup> *Howard v. Gossett*, 10 Q.B. 359, 116 Eng. Rep. 139 (Q.B. 1845), *rev'd*, 10

lieved that they, too, were endowed with plenary investigative power, which could be enforced by warrant and arrest for contempt.<sup>6</sup>

And so, when our federal and state constitutions were adopted, judges and legislators alike were accustomed to investigative activities by legislative committees, supported by the legislatures' own compulsory process. Two of the early state constitutions expressly conferred investigative powers on their legislatures;<sup>7</sup> the absence of such provisions from the federal and other state constitutions merely reflected the prevalent belief that the investigative function was, of inherent necessity, ancillary to the legislative power. For example, in 1781 the Virginia House of Delegates empowered its standing committees to send for persons and papers,<sup>8</sup> and in 1792 the United States House of Representatives instituted the first congressional investigation, into the defeat of General St. Clair's army in the Northwest Territory.<sup>9</sup>

Judicial review of the constitutionality of statutes was, of course, foreseen and advocated by Hamilton and other proponents of the Constitution.<sup>10</sup> The structure of that document soon led to the conclusion that statutes in conflict therewith

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Q.B. 411, 116 Eng. Rep. 158 (Ex. 1847); *Lines v. Russell*, 19 L.T. (O.S.) 364 (N.P. 1852). It was well settled, however, that Parliament's power of arrest for contempt did not survive the end of the session, and thereafter any one imprisoned by Parliamentary warrant would be released upon application to the courts. See *The Earl of Shaftsbury's Case*, 1 Mod. Rep. 144, 86 Eng. Rep. 792 (K.B. 1677).

<sup>6</sup> Potts, *supra* note 3, at 708-12. However, when questions later arose before the Privy Council about the privileges of colonial legislatures, it was held that they were not endowed with the *lex et consuetudo Parliamentii*, and therefore could punish only contempts which actually obstructed their deliberations, and could not arrest one who refused to answer questions before a legislative committee of inquiry. *Fenton v. Hampton*, 11 Moo. P.C. 347, 14 Eng. Rep. 727 (1858); *Kielly v. Carson*, 4 Moo. P.C. 63, 13 Eng. Rep. 225 (1842); see also *Landers v. Woodworth*, 2 Can. Sup. Ct. 158 (1878). Contra: *Beaumont v. Barrett*, 1 Moo. P.C. 59, 12 Eng. Rep. 733 (1836); *Ex parte Dansereau*, 19 L.C. Jur. 210 (Q.B. Montreal 1875).

<sup>7</sup> These were the constitutions of Maryland (1776) and Massachusetts (1780). See Potts, *supra* note 3, at 713-14.

<sup>8</sup> Potts, *supra* note 3, at 716.

<sup>9</sup> 3 ANNALS OF CONG. 490-94 (1792).

<sup>10</sup> See THE FEDERALIST, No. 78 (Hamilton).

must be treated by the courts as invalid.<sup>11</sup> Once it was settled that the law-making power was itself subject to judicially enforceable constitutional limitations, it followed that the ancillary legislative powers — such as the investigative function — were likewise so limited. This logic was inexorable, but the actual operations of the few investigations of that time<sup>12</sup> did not cut so deeply into the national life as to precipitate the issue before the courts. Not until 1821 did the Supreme Court have occasion to touch the problem, and then but inconclusively.<sup>13</sup> Thereafter, almost sixty years passed before the Court squarely held in *Kilbourn v. Thompson*<sup>14</sup> that the power of Congress, to punish contumacious witnesses

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<sup>11</sup> In 1795 or earlier for state statutes, and in 1803 for federal statutes. *Van-horne's Lessee v. Dorrance*, 2 Dall. 304, 320 (U.S. 1795); *Marbury v. Madison*, 1 Cranch 137 (U.S. 1803).

<sup>12</sup> Landis, *supra* note 3, at 170-77, lists twelve investigations by the House of Representatives and one by the Senate from the adoption of the Constitution to 1822. All of these were concerned with the activities of the executive departments or with military operations.

<sup>13</sup> *Anderson v. Dunn*, 6 Wheat. 204 (U.S. 1821). This decision established the power of the House of Representatives to arrest and punish by imprisonment for "contempts committed against themselves," whether within or without the walls of the House. *Id.* at 224-25. This power, it was stated, must be exercised in accordance with the principle "*the least possible power adequate to the end proposed.*" *Id.* at 230-31. Likewise, the British rule that the imprisonment could in no event extend beyond Parliament's adjournment (*supra*, note 5) was declared applicable to Congress. *Id.* at 231.

It has often been said that this case held that the legislature's determination that a punishable contempt had been committed is conclusive and not subject to judicial review. See, e.g., EBERLING, CONGRESSIONAL INVESTIGATIONS 209, 345, 353 (1928). There are superficial implications to this effect in the opinion: ". . . there is nothing on the face of this record from which it can appear on what evidence this warrant was issued. And we are not to presume that the House of Representatives would have issued it without duly establishing the fact charged on the individual." *Anderson v. Dunn*, 6 Wheat. at 234. Anderson, however, had challenged the warrant on the ground of total lack of power in the House to punish contempts committed outside its presence, not the validity of the exercise of the power in the particular case (which, from other sources, appears to have arisen out of Anderson's attempt to bribe a member). Carefully read, it is clear that the case holds only that the legislature's warrant will be presumed to be based on valid grounds unless those grounds are challenged, and does not hold that such a presumption is conclusive.

There appear to be no relevant judicial decisions in the United States prior to *Anderson v. Dunn*. It was followed, in a case in which the Senate's power was in question, *Ex parte Nugent*, 18 Fed. Cas. 471, No. 10,375 (C.C.D.C. 1848). The powers of legislative investigating committees do not appear to have been directly dealt with in any American judicial decision before 1855.

<sup>14</sup> 103 U.S. 168 (1880).

before investigating committees by imprisonment for contempt, is subject to judicial review.

If it seems peculiar that the Constitution was in effect for almost a century before this rule was clearly established, it is less so when one recalls that only two acts of Congress were held constitutionally invalid prior to the Civil War.<sup>15</sup> The growth of constitutional law was brisker thereafter. Furthermore, years before the decision in the *Kilbourn* case, a considerable body of law about the investigative powers of the state legislatures had been developed in decisions by the courts of New York, Massachusetts, and Wisconsin.<sup>16</sup> In none of these cases was the right of judicial review denied, in several of them it was categorically affirmed,<sup>17</sup> and in the very first case (*Briggs v. Mackellar*)<sup>18</sup> the court declined to require the witness to answer certain questions which were held not pertinent to the legislative inquiry. Judge Daly's opinion in the *Briggs* case (involving an investigation of the New York City police) is remarkable for its grasp and vision; he held or declared that (1) investigations backed by compulsory process are "essential to the full and intelligent exercise of the legislative function";<sup>19</sup> (2) the investigative power

<sup>15</sup> Those under review in *Marbury v. Madison*, 1 Cranch 137 (U.S. 1803), and *Scott v. Sandford* (the *Dred Scott* Case), 19 Howard 393 (U.S. 1857). From 1860 to 1900, 23 such decisions were rendered, and there were 30 more between 1900 and 1928. See HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 89 (1928).

<sup>16</sup> *Emery's Case*, 107 Mass. 172 (1871); *Sanborn v. Carleton*, 15 Gray 399 (Mass. 1860); *Burnham v. Morrissey*, 14 Gray 226 (Mass. 1859); *People v. Learned*, 5 Hun 626 (N.Y. Sup. Ct. 1875); *Briggs v. Mackellar*, 2 Abb. Pr. 30 (N.Y.C.P. 1855); *In re Falvey*, 7 Wis. 630 (1858). See also *Stewart v. Blaine*, 1 MacArth. 453 (D.C. 1874); *Irwin's Case* (D.C. 1875) (reported only in 3 CONC. REC. 707-27 (1875)); *Lilley v. United States*, 14 Ct. Cls. 539, 542 (1878). Cf. *Ex parte McCarthy*, 29 Cal. 395 (1866) and *State v. Matthews*, 37 N.H. 450 (1859), which do not involve legislative investigations, but follow *Anderson v. Dunn*, 6 Wheat. 204 (U.S. 1821), in upholding the legislature's power to punish for contempt.

<sup>17</sup> *Emery's Case*, *Burnham v. Morrissey*, *Briggs v. Mackellar*, and *Irwin's Case*, all *supra* note 16.

<sup>18</sup> 2 Abb. Pr. 30, 65 (N.Y.C.P. 1855). Landis, *supra* note 3, at 167-68, rightly noted the breadth of Judge Daly's description of the investigative power, but overlooked the limitations he laid down, and was in error in stating that "Prior to 1880 no state decision denies or curtails the exercise" of the power, when in fact this very decision curtailed the power, as described above in the text.

<sup>19</sup> *Briggs v. Mackellar*, 2 Abb. Pr. 30, 57 (N.Y.C.P. 1855).

is limited by the Constitution, for "the legislature . . . can exercise only such powers as have been delegated to it";<sup>20</sup> (3) legislative committees can require answers only to questions pertinent to the investigation as authorized by the legislature itself;<sup>21</sup> (4) a witness need not "answer any question that would tend to incriminate him";<sup>22</sup> and (5) the courts will, when justiciable controversy arises, review the exercise of the investigative power. For all that has since been written, the law has not departed far from these principles, enunciated nearly a century ago.

Whatever may be the merits or defects of the particular exercise of judicial power in the *Kilbourn* case,<sup>23</sup> Mr. Justice Miller's categorical assertion of the power thus found ample precedent in these state court decisions, as well as in the antecedent logic of *Marbury v. Madison*.<sup>24</sup> Nor was it long before the Supreme Court found occasion to reiterate the right to review the exercise of legislative investigative power. The era of social legislation was beginning, and Congress early empowered the Interstate Commerce Commission and other administrative agencies to conduct investigations within their spheres of interest. These inquiries, of course, depended for their authority on, and were delegations of, the congressional investigative power, and in this respect were no different from those conducted by congressional committees.<sup>25</sup> The Court

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<sup>20</sup> *Id.* at 61.

<sup>21</sup> *Id.* at 62.

<sup>22</sup> *Ibid.*

<sup>23</sup> Landis, *supra* note 3, at 159-64, conclusively demonstrated that Mr. Justice Miller's historical scholarship was grievously at fault in describing Parliament's power to punish for contempt as an attribute of its ancient judicial, rather than its legislative, functions. No doubt, too, Mr. Justice Miller's determination, that the Jay Cooke investigation was judicial rather than legislative in character, was superficial and *a priori* rather than analytical. These features of the *Kilbourn* case have been frequently and, I believe, rightly criticized.

<sup>24</sup> 1 Cranch 137 (U.S. 1803).

<sup>25</sup> *Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 437 (1938); *ICC v. Brimson*, 154 U.S. 447 (1894); *Attorney-General v. Brissenden*, 271 Mass. 172, 171 N.E. 82 (1930); *State v. Sims*, 130 W.Va. 430, 43 S.E.2d 805 (1947). This proposition would seem too plain for argument, and yet numerous discussions of legislative investigative power, including authoritative articles such as the one by Landis, *supra* note 3,

lost no time in declaring<sup>26</sup> that it would "not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress."

In 1908 the Court held in *Harriman v. ICC*,<sup>27</sup> that the Interstate Commerce Commission could compel testimony in aid of an investigation only if a specific breach of the law was under inquiry, and in 1924 the same restriction was laid upon the Federal Trade Commission in *FTC v. American Tobacco Co.*<sup>28</sup> In each case the decision rested on statutory construction, and the bare holding was merely that Congress had not authorized the Commission to conduct general legislative investigations. But the opinions, both written by Mr. Justice Holmes, justified the narrow statutory construction by the grave constitutional questions which a broader interpretation would raise, and abounded in emphatic suggestions that the Bill of Rights would be jeopardized by unlimited legislative inquiries into "private papers" and by unwarranted "sacrifice of privacy."

Standing by themselves, some expressions in the *Kilbourn*, *Harriman*, and *American Tobacco* cases might have cast doubt on the adequacy of Congress' power to compel testimony in aid of a purely legislative inquiry. But other decisions during the same general period removed any such doubts. In 1897 the Court upheld the constitutionality of a statute, originally enacted in 1857,<sup>29</sup> which made it a crime for any

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ignore judicial decisions dealing with the power when delegated by the legislature to and exercised by administrative agencies, which are in fact and logic highly pertinent.

<sup>26</sup> *ICC v. Brimson*, 154 U.S. 447, 478 (1894). See also *In re Pacific Ry. Comm'n*, 32 Fed. 241 (C.C.N.D. Cal. 1887).

<sup>27</sup> 211 U.S. 407 (1908).

<sup>28</sup> 264 U.S. 298 (1924).

<sup>29</sup> 11 STAT. 155 (1857). This law was codified REV. STAT. §§ 101-04, 859 (1875), 2 U.S.C. §§ 191-94 (1946). Under this statute, of course, the duration of imprisonment of a contumacious witness no longer is limited to that of the congressional session. Curiously, however, Congress continued to rely on its own power to punish contumacy by contempt, and no prosecution was brought under the criminal statute until 1894. Eberling, *supra* note 13, at 262-68, 358-61. See *In re Chapman*, 166 U.S. 661 (1897). At the present time the statute is resorted to constantly and the contempt power rarely.



person to refuse to appear and give pertinent testimony if subpoenaed by a duly authorized committee of either house of Congress.<sup>30</sup> And in 1927, in *McGrain v. Daugherty*,<sup>31</sup> the Court upheld the Senate's action in arresting a witness for refusing to appear before a committee investigating the administration of the Department of Justice, saying<sup>32</sup> that "the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for that purpose." During the next few years these principles were reaffirmed in *Sinclair v. United States*,<sup>33</sup> and *Jurney v. MacCracken*.<sup>34</sup>

*The Illusion of Congressional Investigative Omnipotence*

In the light of this background, it might well be wondered that lawyers and legislators came to disparage the substance of judicial review of legislative investigations. Furthermore, this attitude grew up at the very time that the Court, while sanctioning the exercise of the investigative power, was reiterating its subjection to constitutional limitations, in language which was equally categorical whether the author was Mr. Justice Holmes,<sup>35</sup> Van Devanter,<sup>36</sup> Butler,<sup>37</sup> Sutherland,<sup>38</sup> or Brandeis.<sup>39</sup> The last-named, indeed, declared in 1935 that any fear that Congress might abuse its powers is "effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to

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<sup>30</sup> *In re Chapman*, 166 U.S. 661 (1897).

<sup>31</sup> 273 U.S. 135 (1927).

<sup>32</sup> *Id.* at 165.

<sup>33</sup> 279 U.S. 263 (1929), which affirmed a conviction under the criminal statute the constitutionality of which had been upheld in *In re Chapman*, 166 U.S. 661 (1897).

<sup>34</sup> 294 U.S. 125 (1935) (a contempt case).

<sup>35</sup> See *FTC v. American Tobacco Co.*, 264 U.S. 298, 306 (1924).

<sup>36</sup> See *McGrain v. Daugherty*, 273 U.S. 135, 165, 176 (1927).

<sup>37</sup> See *Sinclair v. United States*, 279 U.S. 263, 291-92 (1929).

<sup>38</sup> See *Jones v. Securities Commission*, 298 U.S. 1, 25-26 (1936).

<sup>39</sup> See *Jurney v. MacCracken*, 294 U.S. 125, 147-48, 150 (1935).

judicial review.”<sup>40</sup> The core of our inquiry is whether the courts will pick up Mr. Justice Brandeis’ promissory note.

How, then, did the current illusion of congressional omnipotence develop? In origin it was no illusion; it was indignation generated by the scandals of the Harding administration, disclosed by Senate committee investigations conducted by Senators Tom Walsh, Burton K. Wheeler, Smith Brookhart and others. When political stakes are high, the words are hot, and the investigational techniques were much criticized. In May, 1924 a federal district judge set aside a committee subpoena,<sup>41</sup> and it was not until January, 1927 that the Supreme Court reversed his decision and upheld the Senate’s power of inquiry.<sup>42</sup> In the meantime, and in defense of that power against these strictures, a powerful topical article by the then Professor Felix Frankfurter, and two formidable historical analyses by Landis and Potts, had made their appearance in print.<sup>43</sup> The authors did not deny the right of judicial review, but by virtue of their object they stressed the breadth of Congress’ power of inquiry, and made little or no mention of limits of the power.

These writings contributed perceptibly to the trend of legal thinking about congressional investigations that arose naturally from the political dynamism of the first two Roosevelt administrations. The thirties were years of expanding congressional power, exerted to counteract the blight of economic depression. In the minds of many, the courts were an obstacle to the effectuation of the national will. The investigation conducted by Ferdinand Pecora under the authority of the Senate Banking and Currency Committee rocked the citadels of financial power and led directly to federal regulation of securities exchanges and public utility holding companies.

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<sup>40</sup> *Id.* at 150.

<sup>41</sup> *Ex parte Daugherty*, 299 Fed. 620 (S.D. Ohio 1924).

<sup>42</sup> *McGrain v. Daugherty*, 273 U.S. 135 (1927).

<sup>43</sup> Frankfurter, *Hands Off the Investigators*, 38 NEW REPUBLIC 329 (May 21, 1924); Landis, *supra* note 3; Potts, *supra* note 3.

While the Supreme Court was invalidating the National Recovery and Agricultural Administration Acts,<sup>44</sup> Senators Black, LaFollette, Wheeler, Elbert Thomas, Nye, Truman, O'Mahoney and others were using the investigative process to pave the way for new and sweeping assertions of federal legislative power. The temper of the New Deal was favorable to the untrammelled use of congressional inquiries to attain social ends thought desirable, and hostile to the intrusion of judicial power to check the Congress, whether on legislation or investigation bent.

In this climate the illusion of investigative omnipotence flowered. It survived the war, and now confronts us<sup>45</sup> at a time when legislative inquiries are chiefly concerned with matters which, however labelled, lie close to the roots of freedom. Many of those who supported investigations in support of social legislation during the thirties are deeply disturbed by what they regard as totalitarian tendencies in the inquiries of the last few years. But if Senators Black, LaFollette, and Wheeler were entitled to proceed unchecked by the courts, should not the same apply to Senators McCarthy, Jenner, and McCarran and to Congressmen Dies and Velde?

No wonder there has been considerable confusion and some schizophrenia among the "liberals" who feel themselves impaled on these dilemmic horns.<sup>46</sup> A very prominent former

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<sup>44</sup> *United States v. Butler*, 297 U.S. 1 (1936); *Schechter Corp. v. United States*, 295 U.S. 495 (1935).

<sup>45</sup> See, e.g., Collins, *The Power of Congressional Committees of Investigation to Obtain Information from the Executive Branch*, 39 GEO. L. J. 563 (1951); Ehrmann, *The Duty of Disclosure in Parliamentary Investigation: A Comparative Study*, 11 CH. L. REV. 1, 117 (1943); Herwitz and Mulligan, *The Legislative Investigating Committee*, 33 COL. L. REV. 1 (1933); Morgan, *Congressional Investigations and Judicial Review: Kilbourn & Thompson Revisited*, 37 CALIF. L. REV. 556 (1949). In WECHSLER, *THE AGE OF SUSPICION* (1953) it is stated at 279: "By and large liberals have believed in giving wide scope to congressional committees."

<sup>46</sup> See Boudin, *Congressional and Agency Investigations: Their Uses and Abuses*, 35 VA. L. REV. 143, 145-48, 177-78 (1949); CARR, *THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES* 409 (1952). The problem is discussed from the standpoint of a "lay victim" of a Senate investigation in WECHSLER, *op. cit. supra* note 45, at pp. 260-325.

attorney<sup>47</sup> has gone so far as to suggest that the current excesses of congressional inquisitors were facilitated by the unqualified support given to New Deal investigations by "liberals" whose chickens are now coming home to roost.

There is just enough truth in this charge to make it worth pondering. But however one assays it, the converse is equally to be reflected upon. The financial, industrial and other magnates who were the objects of congressional scrutiny in the twenties and thirties did not lack for "conservative" lawyers to represent them before the committees or to denounce the investigations in print.<sup>48</sup> Today the witnesses before the several committees inquiring into subversive activities — whether because the issues are different, the fees smaller, or the likelihood of unfavorable publicity greater — find few "conservative" counsel available to defend them or to question publicly the tactics and purposes of the investigators. In short, no one lacks an ox for goring, and the roosting chickens are no more the exclusive property of "liberals" than of "conservatives." Sharper tools than these shopworn labels must be used to lay bare the true issues.

### *The Scope of Judicial Review*

We must start, then, by discarding the popular notion of investigative omnipotence, and revert to the premise — historically and logically established — that legislative investigative actions, like statutory enactments, may give rise to justiciable case and controversy and thus precipitate judicial review.<sup>49</sup> In general, the same constitutional provisions will relate to both.

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<sup>47</sup> The Hon. John J. McCloy, speaking before the New York Chamber of Commerce on April 2, 1953 stated: "It is the old matter of whose ox is gored. If the liberals had been more expressive when the so-called congressional investigations of the thirties were assiduously violating personal rights and when business was the target, there would have been less likelihood of excess in this day and age." N.Y. CHAMBER OF COMMERCE, MONTHLY BULL. 370-77 (Apr. 1953).

<sup>48</sup> See, e.g., Coudert, *Congressional Inquisition vs. Individual Liberty*, 15 VA. L. REV. 537 (1929).

A legislative investigation, or particular questions asked during its course, may be challenged on constitutional grounds for *lack of power* as (1) violative of the principle of separation of powers, because essentially executive or judicial rather than legislative in nature; (2) beyond the reach of federal or state power, as the case may be; (3) barred by the guaranties of free speech and against unreasonable searches and seizures; or (4) barred by the due process clause, if the authorizing resolution is too vague to enable a witness to determine what matters are within its reach. And, apart from the Constitution, particular questions may be challenged for lack of power on the ground that they are not germane to the inquiry which the legislature has authorized to be conducted, by its own committee or by an administrative agency as the case may be.

Even if the investigative agency's power to inquire is clearly established, a witness may decline to answer on a claim of *privilege*, and the courts will review the validity of his claim. The privilege may be personal to the witness, and by far the best known example is the witness' privilege based on the Fifth Amendment, to refuse to give testimony that might tend to incriminate him. Or it may be based upon the present or past position held by the witness, as in the case of confidential information obtained by a lawyer or doctor in his professional capacity, or by a citizen in the course of

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<sup>49</sup> We are concerned here only with the power of a legislative investigative agency to compel answers (whether testimonial or documentary) to questions by arrest for contempt and to punish failure to answer by contempt or criminal process. We are not concerned with the "right" of such an agency to ask questions in hope or expectation of a voluntary reply and without resort to any form of a compulsory or punitive process. In all probability, the courts would not review the right to ask, and would hold that no legal right of the witness is affected if no effort is made to force him to answer. See *Bowers v. United States*, 202 F.2d 447, 448 (D.C. Cir. 1953). To the contrary, it might be argued that the mere asking of questions, particularly at a public session of a legislative inquiry, puts the witness under pressure to answer, and that a refusal to respond, even if soundly based on the committee's lack of power to compel a reply, tends to degrade, humiliate, or embarrass the witness. Cf. *McCollum v. Board of Education*, 333 U.S. 203, 227, 232-33 (1948).

service on a grand jury. More important for present purposes, a government official might decline to reveal military or diplomatic secrets, or a judge to disclose his discussions in chambers, claiming privilege based on the constitutional separation of powers.

Most recently, the televising of some congressional committee hearings has focussed attention on the question whether a witness may challenge the *procedure* by which the hearing is conducted. The basis, if any, for judicial review of investigative procedures is still largely unexplored.

Whether the question is one of power, privilege, or procedure, the *form* in which judicial review is sought may be important to the outcome. Today the investigative power is usually tested by a criminal proceeding against the witness, but other forms of action have been used in the past, and quite possibly some form of civil action might now be found preferable.

That the foregoing matters may all be the basis of judicial review does not mean that the courts will either freely or frequently exercise their power by affirmative action to protect witnesses, or by countenancing refusals to answer questions. Reluctance to interfere with the actions of a coordinate branch of the government will continue, and rightly, to dictate judicial restraint. In these tempestuous times, forecasts of judicial decision are adventurous, if not reckless. Some of the considerations which may weigh in the balance are discussed hereinafter.<sup>50</sup>

### *Separation of Powers*

In the *Kilbourn* case, the Court held that a congressional inquiry into the operations of a named "real estate pool," in which the federal government might have a creditors' interest,

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<sup>50</sup> Obviously, each of the ensuing subdivisions might itself furnish the material for a long article. The treatment herein is necessarily brief. Many of these matters are touched upon in the excellent article by District Judge Charles E. Wyzanski, Jr., *Standards for Congressional Investigations*, 3 N.Y. BAR ASS'N RECORD 93 (1948).

was "judicial" rather than "legislative," and Congress' power to compel testimony in aid of such an inquiry was disallowed. The doctrine of separation of powers was, therefore, the constitutional limitation earliest invoked in the Supreme Court against congressional investigation. The challenge was notably successful,<sup>51</sup> and the broad principles enunciated in the *Kilbourn* case have not since been questioned.<sup>52</sup> Their specific application and the language of the opinion, however, have been much criticized,<sup>53</sup> and it seems safe to say that only under very unusual circumstances would the doctrine of separation of powers today be held to destroy the legislature's power to conduct an investigation.

So far as intrusion on the sphere of judicial action is concerned, the question is most likely to arise when the legislature (as in the *Kilbourn* case) initiates an investigation into charges against specific individuals or institutions, or arising out of particular episodes. At the present time such inquiries are usually directed to some act or agency of the executive branch, and the tendency in these circumstances is to uphold the power of investigation; even where the purpose appears to be to try charges rather than obtain information for legislation, the courts will give the legislature the benefit of the doubt and presume a legislative object.<sup>54</sup> But where

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<sup>51</sup> Not merely particular questions, but the entire inquiry, was held beyond the power of Congress. Furthermore, Kilbourn eventually recovered \$20,000 from his action for false imprisonment against the Sergeant at Arms of the House of Representatives. See *In re Pacific Ry. Comm'n*, 32 Fed. 241, 253 (C.C.N.D. Cal. 1887).

<sup>52</sup> Insofar as the *Kilbourn* case held that (1) the exercise of Congress' power to punish for contempt is subject to judicial review, (2) Congress' power of legislative inquiry is, like the law-making power, subject to constitutional limitations, and (3) the doctrine of separation of powers is one such limitation, it has never been questioned and has repeatedly been reaffirmed. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

<sup>53</sup> See note 23 *supra*. In *United States v. Rumely*, 345 U.S. 41, 46 (1953), the Court referred to the "loose language" of the *Kilbourn* case, as well as to "the weighty criticism to which it has been subjected" and "the inroads that have been made upon that case by later cases", citing the *McGrain* and *Sinclair* cases.

<sup>54</sup> *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Attorney General v. Brissenden*, 271 Mass. 172, 171 N.E. 82 (1930); *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 2 N.E. 615 (1885). The more restrictive viewpoint of the *Kilbourn* case was echoed in *People ex rel. Sabold v. Webb*, 5 N.Y. Supp. 855 (Sup.Ct. 1889); *State ex rel.*

the subject of such an inquiry is the operation of the judicial process itself,<sup>55</sup> or is a private person or institution,<sup>56</sup> the courts are more likely to hold that an investigation can not be used as a substitute for impeachment in the former case, or for a trial by the usual processes of law in the latter. Nevertheless, the declared purposes of most present-day investigations are so sweeping and general<sup>57</sup> that this sort of question is not likely to arise often.

I am not aware that any investigation has yet been challenged on the ground that it was inherently executive rather than legislative in character.<sup>58</sup> Certainly such an attack is theoretically possible, as if Congress should abolish the Departments of Justice and the Interior, and instead authorize its own committees to collect evidence of violations of law in order to prosecute offenders before the courts, institute

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Rulison v. Gayman, 31 Ohio Cir. Ct. Rep. 59 (1908); *Ex parte* Caldwell, 138 Fed. 487 (C.C.N.D. W.Va. 1905), *rev'd on other grounds*, Carfer v. Caldwell, 200 U.S. 293 (1906), which held that whether the separation of powers provisions of a state constitution had been violated did not present a federal question under the Fourteenth Amendment's due process clause.

<sup>55</sup> There are few decided cases, but it seems highly improbable that the courts would permit legislative investigation of their handling and disposition of particular cases. *Cf.* Commonwealth v. Costello, 21 Pa. Dist. 232 (1911). In June, 1953, seven federal district judges in California declined to testify under subpoena before a subcommittee of the House of Representatives, on the ground that congressional inquiry into their handling of tax cases would violate the doctrine of separation of powers. See Fortas, *Outside the Law* 192 ATLANTIC MONTHLY 42 (August, 1953).

<sup>56</sup> Greenfield v. Russel, 292 Ill. 392, 127 N.E. 102 (1920), wherein an investigation of criminal charges against the Voliva (world-is-flat) church at Zion City was held, in my opinion rightly, to be "an invasion of the province of the judiciary" and beyond the power of the state legislature. See Tenney v. Brandhove, 341 U.S. 367, 377 (1951), citing *Kilbourn* and *McGrain* cases: "This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role."

<sup>57</sup> This very generality, however, precipitates a wholly distinct constitutional question under the due process clause. See heading, "Vagueness and the Due Process Clause", *infra*.

<sup>58</sup> We are not discussing here the issues which may arise when, in the course of an investigation admittedly legislative in nature, questions are put which the witness may refuse to answer on the ground of executive or judicial *privilege* based on the separation of powers, or where the investigation is conducted in such a manner as to destroy or paralyze executive or judicial functions. See Heading, "Executive, Judicial, and Other Privileges," *infra*. Here we are concerned only with inquiries which purport to be legislative investigations but are in fact inherently judicial or executive in their nature and purpose, and are therefore *usurpations* of power not vested in the legislature.



such prosecutions, issue patents to public lands, and enter into contracts for the construction of dams. Perhaps this question will become actual rather than theoretical, if the current proclivity of some congressional committees to amass individual *dossiers* and dictate executive action is not soon checked.

But this takes us into deep and uncharted waters. However such questions might be decided, I think it unlikely, provided the authorizing resolutions are drafted with reasonable skill, that we shall again see an entire congressional inquiry invalidated on the ground of separation of powers. Rather the principle of the *Kilbourn* case will be applied to rule out particular categories of questions.<sup>59</sup> In the course of the recent Senate investigation of charges of espionage and subversion in the Army Signal Center at Fort Monmouth, the committee chairman is reported to have put the following "question" to a witness who had pleaded the privilege against self-incrimination:<sup>60</sup> "Julius Rosenberg was convicted as a spy and executed. From your refusal to answer you apparently engaged in the same type of espionage [sic]. Do you feel you should be walking the streets free — or have the same fate as the Rosenbergs?" The witness characterized the question as "outrageous,"<sup>61</sup> and the courts would undoubtedly hold that such efforts to convert a legislative

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<sup>59</sup> Thus, in the course of a legislative investigation concerned with subversive activities, it might appear from all the attendant circumstances that a particular witness was summoned (or particular questions were asked), not in aid of the legislative purpose, but in order to inculcate or exculpate the individual. See *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 485, 2 N.E. 615 (1885): "An investigation instituted for the mere sake of investigation, or for political purposes, not connected with intended legislation, or with any of the other matters upon which the house could act, but merely intended to subject a party or body investigated to public animadversion, or to vindicate him or it from unjust aspersions, where the legislature had no power to put him or it on trial for the supposed offenses . . . would not, in our judgment, be a legislative proceeding, or give to either house jurisdiction to compel the attendance of witnesses or punish them for refusing to attend." Cf. *Townsend v. United States*, 95 F.2d 352 (D.C. Cir. 1938).

<sup>60</sup> N. Y. Herald-Tribune, November 26, 1953, p. 34, col. 5.

<sup>61</sup> Senator McCarthy defended the question on the ground that "we had 140,000 casualties because of the treason of sleazy characters like you." *Ibid.*

inquiry into a tribunal for the trial of criminal charges violate the doctrine of separation of powers, and that the witness (quite apart from the privilege against self-incrimination) could not be required to answer.

### *The Limits of Federal and State Power*

Because of the Constitutional division of power between the federal and state governments, both federal and state statutes have often been held unconstitutional on the ground that they transcended the delegated powers of the federal government or the reserved powers of the states, as the case might be. *A priori*, it might have been expected that the courts would find equally frequent occasion to invalidate federal or state legislative investigations on like grounds.

In point of fact, as far as I have been able to determine, no congressional investigation and but one state investigation<sup>62</sup> has encountered judicial disapproval as *ultra vires* under the federal system. In Australia, to be sure, it was squarely held by the Privy Council that a statute, authorizing an investigation into matters outside the powers delegated by the constitution to the Commonwealth, was invalid.<sup>63</sup> But it appears unlikely that the bounds of United States congressional power will be so sharply defined for investigative purposes. The pattern of federal power is so expansive and interlaced that it is easy to devise plausible arguments that almost any inquiry is reasonably related to some federal power,<sup>64</sup>

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<sup>62</sup> United States v. Owlett, 15 F. Supp. 736 (M.D. Pa. 1936).

<sup>63</sup> Attorney-General for the Commonwealth of Australia v. The Colonial Sugar Refining Co., [1914] A.C. 237 (P.C. 1913). Pursuant to the Royal Commissions Act of 1902-1912, the Governor-General had initiated an investigation of the sugar industry in Australia. The colonial company brought action to enjoin enforcement of a summons to testify. That action, by this decision, prevailed.

<sup>64</sup> Cf. Wyzanski, *supra* note 50, at 96, where it is suggested that a congressional inquiry into state divorce practices might be relevant to federal tax problems. The trouble with this argument is that it seems to prove too much. Can every married man be forced to state whether or not he is a member of a group charged as a "Communist-front organization," on the theory that this might be relevant to the family credits and exemptions in the federal income tax laws? This is not fanciful; a bill recently introduced in the legislature of the State of California would require

and no doubt the courts will be rightfully cautious, and unwilling to declare a matter wholly outside the federal or state investigative power except in a very clear case.

Nevertheless, such cases may arise. In 1936 the Pennsylvania legislature authorized an investigation of the operation in that state of the federal Works Progress Administration. Several WPA officials were subpoenaed, but a federal district court enjoined enforcement of the subpoenas<sup>65</sup> on the grounds that: "The complete immunity of a federal agency from state interference is well established,"<sup>66</sup> and "The investigatory power of a legislative body is limited to obtaining information on matters which fell within its proper field of legislative action."<sup>67</sup>

This decision seems clearly correct, and the same principle must logically be applied to federal investigative actions which intrude in the domain of state power.<sup>68</sup> Recently, for example, congressional committees have been investigating the loyalty of individual teachers and other employees of municipal school systems in New York City, Philadelphia, and elsewhere. These were defended on the ground that it was not the city schools but the individuals that were under federal scrutiny; yet one may well ponder the result should the state or city government instruct its teachers not to honor the federal investigatory process, on the ground that the state's own loyalty program for teachers was being interfered

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everyone claiming any exemption from his state income tax to file a statement under oath that he does not advocate the violent overthrow of government. (N.Y. Times, April 25, 1953 p. 8, col. 4-5). Similarly, the argument is sometimes made that the investigative power is unbounded because it may be used to inquire into the desirability of constitutional amendments. But this is equally self-defeating, as it would entirely vitiate the constitutional guarantees, and would enable federal and state investigating committees to roam uninhibited through each other's pastures.

<sup>65</sup> *United States v. Owlett*, 15 F. Supp. 736 (M.D. Pa. 1936).

<sup>66</sup> *Id.* at 741.

<sup>67</sup> *Id.* at 742.

<sup>68</sup> *Cf. United States v. Di Carlo*, 102 F. Supp. 597, 601 (N.D. Ohio 1952), wherein it is stated that Congress cannot investigate matters exclusively within the reserved powers of the states "except as they may affect matters within the scope of the powers granted to the federal government."

with, or that the morale and efficient functioning of the educational system were adversely affected by unwarranted federal interference.

### *The First and Fourth Amendments*

It is in the area of the constitutional guarantees of freedom, embodied in the Bill of Rights, that the proximate and most searching tests of legislative investigative power are occurring. The most intransigent and far flung of the current inquiries are directed to the political actions, affiliations, and beliefs of individuals. Thereby the legislature's legitimate concern for the security and stability of government encounters the prohibitions in the Constitution against laws "abridging the freedom of speech, or of the press" and against "unreasonable searches and seizures."<sup>69</sup>

Because legislative inquiries have not, until recent years, been concerned with subversive activities, the courts are now encountering almost *de novo* the equation between the investigatory process and the constitutional guarantees. To be sure, intimations of the problem can be found more than a century back.<sup>70</sup> Likewise, although the decisions of the Supreme Court limiting the exercise of congressional investigatory power have not, until very recently, been directly

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<sup>69</sup> Other provisions of the Bill of Rights may, of course, be impinged upon by the investigative process; an example, the protection against self-incrimination is discussed under Heading, "The Fifth Amendment: Privilege Against Self-Incrimination," *infra*. In accordance with the premise, spoken or unspoken, of most of the cases, the First Amendment's guarantee of free speech is assumed herein to be relevant to testimonial compulsory process, and the Fourth Amendment's prohibition of unreasonable searches and seizures to be relevant to documentary process under a subpoena *duces tecum*.

<sup>70</sup> In 1832, John Quincy Adams (then a member of the House of Representatives) persuaded the House to amend a resolution, authorizing an investigation of the Bank of the United States, so as to exclude the supposed possibility of an inquiry into the religion or politics of the officers of the bank. 8 CONG. DEB. 2160 (1832); see Landis, *supra* note 3, at 180. *Per contra*, see *In re Falvey*, 7 Wis. 630, 642 (1858): "The very tranquility and existence of the State might require the utmost latitude as to form and subject matter of the questions proposed to be allowed, in order to expose and bring to light some wide spread conspiracy to overthrow the government, or some combination to paralyze its powers by corrupting the high public officers under the government."

concerned with the First Amendment, the *Kilbourn* case and subsequent decisions of the Court have referred to "the private affairs of the citizen" or the "right of privacy" in a manner which reveals acute awareness of the proximity of the Bill of Rights.<sup>71</sup> But the "illusion of investigative omnipotence" enabled it to be written, as recently as 1952, that "The prevailing opinion in Congress has been that the first ten Amendments do not protect parties before committees since these proceedings are only inquiries and bear no relation to court procedure."<sup>72</sup>

The decision in *United States v. Rumely*<sup>73</sup> has now destroyed that illusion, and has reminded bench and bar that the First Amendment is applicable to investigations as well as to statutes.<sup>74</sup> But the Supreme Court has not yet indicated where the lines will be drawn, nor has it stated the basic theory of the First Amendment's applicability to investigations.<sup>75</sup> In the meantime two federal courts of appeal, to the

<sup>71</sup> See Notes 35-39 *supra*. "Private affairs" are spoken of in *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881); *McGrain v. Daugherty*, 273 U.S. 135, 173-74; *ICC v. Brimson*, 154 U.S. 447, 478 (1894); *Jones v. SEC*, 298 U.S. 1, 25-26 (1936). Mr. Justice Butler in *Sinclair v. United States*, 279 U.S. 263, 292 (1929), used the phrase "right of privacy," following Mr. Justice Holmes' terminology in *Harriman v. ICC*, 211 U.S. 407, 419-20 (1908).

<sup>72</sup> See Driver, *Constitutional Limitations on the Power of Congress to Punish Contempts of its Investigating Committees*, 38 VA. L. REV. 887, 888 (1952).

<sup>73</sup> 345 U.S. 41 (1953).

<sup>74</sup> Strictly speaking, the *Rumely* case held only that the House resolution instituting the investigation of lobbying activities was to be construed as not authorizing the Select Committee to require disclosures of the names of private individuals who bought literature from Mr. Rumely's Committee for Constitutional Government. However, this narrow construction of the resolution was adopted in order to avoid "doubts of constitutionality in view of the prohibition of the First Amendment" which the Court found raised by the broader construction contended for by the government. The decision is, therefore, very like the Court's judgments in the *Harriman* and *American Tobacco* cases, (notes 27 and 28, *supra*).

<sup>75</sup> The Constitution guarantees "freedom of speech"; does this include "freedom not to speak" as well as "freedom to speak"? Such appears to be the assumption — rightful, I believe — in such cases as *Kilbourn*, *Harriman*, *American Tobacco*, *Sinclair*, and *Jones*, notes 35 to 38, *supra*. The concurring opinion of Mr. Justice Douglas in the *Rumely* case is based on the premise that forcing X to answer questions or produce documents, may endanger the freedom of speech of everyone else, 345 U.S. at 58: "If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, bookstores, and homes of the land." Finally, it has often been

counterpoint of vigorous dissents, have upheld the power of congressional committees to ask a witness whether or not he is a member of the Communist Party.<sup>76</sup> In those cases the Supreme Court did not see fit to grant *certiorari*, and it is perhaps fair to say that in this general area much has been written in a short time, but little has yet been authoritatively determined.

In this tense arena, it seems safe only to predict that the law, to sustain its growth, will feed upon finger-tip judgment as much as or more than on formal logic. As Mr. Justice Holmes has stated:<sup>77</sup>

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

And so today it is argued on the one hand that the guarantee of free speech is absolute and forbids any legislative impingement, whether by statute or subpoena, and on the other that the guarantee must give way whenever the Congress deems that the national security requires its restriction.

Obsession with either "free speech" or "national security" at the total expense of the other leads to impossible results.<sup>78</sup>

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urged and sometimes held that there is an independent "right of privacy." *Pavesich v. New England Life Ins. Co.*, 122 Ga. 490, 50 S.E. 68 (1905); see notes 35 to 38 *supra*; *Annenberg v. Roberts*, 333 Pa. 203, 2 A.2d 612, 618 (1938); *Shelby v. Second Nat. Bank*, 19 Pa. D. & C. 202, 209 (1933), positing a "right of personal privacy as against unlimited and unreasonable legislative or other governmental investigations"; *Millar v. Taylor*, 4 Burr. 2303, 2379, 98 Eng. Rep. 201, 242 (1769): "It is certain every man has a right to keep his own sentiments, if he pleases: he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends"; Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>76</sup> *United States v. Josephson*, 165 F.2d 82 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948); *Barsky v. United States*, 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948); *Lawson v. United States*, 176 F.2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950). See also *In re Joint Legislative Committee*, 285 N.Y. 1, 32 N.E.2d 769 (1941); *State v. James*, 36 Wash.2d 882, 221 P.2d 482 (1950).

<sup>77</sup> Mr. Justice Holmes in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), quoted in the *Rumely* case, 345 U.S. at 43, 44.

<sup>78</sup> The temper of the times is such that sacrifice of free speech on the altar of national security seems the greater present hazard. In upholding the power of the

At bottom, the two concepts are mutually complementary rather than conflicting; lawless subversion is as much a menace to freedom as to security, and irresponsible disregard of the Bill of Rights undermines security as well as freedom. The Supreme Court will, therefore, avoid the strait-jacket of sweeping decisions and categorical determinants. It is, for example, extremely unlikely that the Court will hold either that *anyone* or that *no one* can be asked whether he belongs to the Communist Party or other subversive organization. Within the present compass, I can only suggest a few lines of thought which are likely to carry weight in the judicial disposition of particular cases.

(1) The courts will allow the investigative process to impinge on the guarantees in the First and Fourth Amendments only where a substantial showing can be made that the question asked or document demanded is reasonably related to the legislative function and necessary to its fulfilment. The very liberal presumptions in favor of legislative purpose,

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House Un-American Activities Committee to compel a witness to state whether or not he was a Communist, the Court of Appeals of the District of Columbia (per Prettyman, J.) declared in *Barsky v. United States*, 167 F.2d 241, 246 (D.C. Cir. 1948): "If Congress has the power to inquire into the subjects of Communism and the Communist Party, it has the power to identify the individuals who believe in Communism and those who belong to the party." From this any of the following consequences would follow: (a) Congress can take a census of Communists and former Communists by requiring everyone to declare whether or not he is or has ever been such; (b) Congress can establish a percentage of Communists by taking a street-corner poll under oath of every tenth passerby; (c) Congress can put the question to every resident of a congressional election district that until recently returned a member of the American Labor Party to office, or to every member of the New York City Police force; (d) Congress can test the veracity of any witness who denies either that he is a Communist, or that someone else known to him is a Communist, by cross-examination and the putting of any question which might be thought to bear on the witness' truthfulness in answering this type of question, e.g., whether the witness believes that there is a trend toward democracy in Yugoslavia, or whether he believes that congressional investigative procedures are supporting or undermining constitutional government. In short, an unlimited right of "identification" under the guise of investigation leads logically to a right of inquisition which is foreign and hateful to our traditions. Cf. *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

which have prevailed in cases where the Bill of Rights was not involved, will not be indulged when a deep issue of personal freedom is at stake.<sup>79</sup> In such circumstances, the courts will confine the investigatory process to "the least power adequate to the end proposed."<sup>80</sup> Where personal inquisition and political aggrandizement masquerade as legislative investigation, or where the legislative benefits are trivial as compared to the incursion on the Bill of Rights, the courts will not lend their aid to force the witness to answer.

(2) Whatever the present scope of the "clear and present danger" rule where statutes or executive acts are concerned, it will be held to have little if any bearing on investigations. As Judge Prettyman has repeatedly pointed out, "Inquiry may be justified when danger is merely potential; danger must be factually real to justify action."<sup>81</sup>

(3) Nevertheless, the apparent imminence or distance of the particular danger will profoundly affect the courts' willingness to countenance incursions on the Bill of Rights. For example, a Hollywood script writer might more reasonably be required to answer to his Communist affiliations, if it had first been shown that his motion pictures were infused with subversive propaganda, than in the absence of such a showing.<sup>82</sup>

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<sup>79</sup> Cf. Opinion of the Justices, 73 A.2d 433, 436 (N.H. 1950) where, dealing with the disclosure of grand jury proceedings to an investigating committee of the State Senate, the court said: "Yet that the public interest requires release from the oath in this regard is not apparent. . . . The sources of the grand jury's information are readily available to the legislature. The conclusions of the grand jurors on the topic mentioned cannot be considered so far essential to the Senate's investigation as to justify disregard of the requirement of secrecy, or to overbalance the public interest which occasions it."

<sup>80</sup> See *Marshall v. Gordon*, 243 U.S. 521, 541 (1917), quoting *Anderson v. Dunn*, 6 Wheat 204, 231 (U.S. 1821).

<sup>81</sup> See his dissenting opinion in *National Maritime Union of America v. Herzog*, 78 F. Supp. 146, 178 (D.D.C.), *aff'd*, 334 U.S. 854 (1948), restating the parallel thought in his opinion for the court in *Barsky v. United States*, 167 F.2d 241, 246-47 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

<sup>82</sup> Cf. *Marshall v. United States*, 176 F.2d 473 (D.C. Cir. 1949) and *Morford v. United States*, 176 F.2d 54 (D.C. Cir. 1949), both of which rely on preliminary showings of pro-Communist activity as justifying the inquiry. See also *United States*



(4) The courts will, I believe, be less rigorous in their enforcement of the Bill of Rights where the area of inquiry lies close to the familiar domain of legislative power. They will, for example, more willingly require a government employee to disclose his political affiliations than a farmer or a journalist.<sup>83</sup>

(5) The courts will not look kindly on inquiries conducted in "dragnet" fashion. As a general proposition, Congress can collect information on a wide scale by questionnaire or like means,<sup>84</sup> but when personal liberties are involved there must be adequate justification for each particular question.<sup>85</sup>

(6) The courts will almost certainly *not* hold that a witness has any special right to refuse to give information, derogatory or otherwise, about other persons.<sup>86</sup> The fact, however, that the witness is asked to be an informer may well

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v. Barry, 29 F.2d 817, 822 (C.C.A. 3rd 1928), *rev'd on other grounds*, 279 U.S. 597 (1929), and Judge Prettyman's dissent in the Maritime Union case, note 81 *supra*, 176 F.2d at 178: "The court held in the Barsky case that a respectable representation to Congress of a potential menace to the nation is sufficient warrant for inquiry into the subject." This suggests the danger of *ex parte* preliminary showings, which is even more clearly manifest in the Marshall case, *supra*, 176 F.2d at 475: "We agree . . . that the Committee had reasonable cause to investigate the Federation, this cause being in the nature of information given to it by Congressman Martin Dies on the floor of the House when he was Chairman of the predecessor to the present Un-American Activities Committee. Any reference to this and other speeches of Congressman Dies would readily convince any reasonable person that this Committee acted properly in conducting the investigation."

<sup>83</sup> On the "identification" theory stated by Judge Prettyman in the *Barsky* case, this factor would make no logical difference. But, as has been shown, note 78, *supra*, the "identification" theory can not sensibly be pressed to the limit.

<sup>84</sup> See *Electric Bond and Share Co. v. SEC*, 303 U.S. 419, 437 (1938); *United States v. Rappeport*, 36 F. Supp. 915, 917 (S.D.N.Y. 1941), *aff'd*, 120 F.2d 236 (2d Cir. 1941).

<sup>85</sup> See *Jones v. SEC*, 298 U.S. 1, 26 (1936): "The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made. . . ." Cf. *Annenberg v. Roberts*, 333 Pa. 203, 2 A.2d 612 (1938), wherein a subpoena *duces tecum* issued in the course of a legislative investigation was set aside as too broad, and therefore in violation of the guarantee against unreasonable searches and seizures.

<sup>86</sup> Cf. *Rogers v. United States*, 340 U.S. 367, 371 (1951) in which, dealing with the privilege against self-incrimination, the Court pointed out that "a refusal to answer cannot be justified by a desire to protect others from punishment, much less to protect another from interrogation by a grand jury."

affect the courts' judgment on whether the legislature's interest is sufficient to override the constitutional guarantees.<sup>87</sup>

Certainly many other legal principles and circumstantial factors will come into play<sup>88</sup> in the process of judicial adjustment of this vexed and delicate equation. And, as I will endeavor to show hereinafter, the *form* of judicial review may powerfully influence the speed and direction of the law's treatment of these problems.

### *Vagueness and the Due Process Clause*

It is familiar doctrine that a criminal statute which is so vaguely drawn that it is difficult to determine what acts are made criminal thereby is unconstitutional under the due process clause.<sup>89</sup> The criminal statute under which the power of congressional investigating committees is usually tested today proscribes refusing to answer questions "pertinent to the subject under inquiry."<sup>90</sup> If a resolution (of Congress or either of its houses) authorizing a committee to conduct an investigation is so drawn that it is impossible to determine what questions are "pertinent", could not a recalcitrant witness defend himself, if subsequently indicted, by invoking the due process clause?

The argument is theoretically impregnable but, as yet, no court has held an authorizing resolution so vague as to nullify the investigatory process thereunder.<sup>91</sup> It was vigorously

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<sup>87</sup> This statement is not based on any notion of "sportsmanship." Rather, it recognizes that governmental compulsion, exercised outside a court of law to force a citizen to give information about the political actions, affiliations, and statements of others, might well be a greater hazard to freedom of speech and relaxed social intercourse than compulsion limited to disclosure of the citizen's own acts, associations, etc. Cf. Mr. Justice Douglas' concurring opinion in *United States v. Rumely*, 345 U.S. 41, 56-58 (1953).

<sup>88</sup> For example, it is clear that the courts will be more reluctant to interfere affirmatively in behalf of an individual claiming injury at the hands of an investigating committee, than merely to refuse to assist the committee in forcing the witness to answer. Cf. *Tenney v. Brandlove*, 341 U.S. 367 (1951).

<sup>89</sup> *Musser v. Utah*, 333 U.S. 95 (1948); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921).

<sup>90</sup> REV. STAT. 102, 104 (1875), as amended, 2 U.S.C. 192, 194 (1946).

<sup>91</sup> See Wyzanski, *supra* note 50, at 95.

pressed on behalf of the defendants in *United States v. Josephson*<sup>92</sup> and *Barsky v. United States*,<sup>93</sup> and in each of them the dissenting judge<sup>94</sup> only was persuaded that the House resolution under which the Committee on Un-American Activities was established<sup>95</sup> is so vague as to furnish "no ascertainable standard of guilt."<sup>96</sup> In the State of Washington, the validity of an even more general investigatory resolution has been upheld.<sup>97</sup>

While the Supreme Court has not yet taken occasion to rule on this problem, it seems unlikely that investigatory resolutions will be held to an exacting standard of precision. However, the importance of the question has been heightened by the Legislative Reorganization Act of 1946, which endows each standing committee of the Senate with the power to subpoena witnesses and documents in connection with "any matter within its jurisdiction."<sup>98</sup> The jurisdiction of each

<sup>92</sup> 165 F.2d 82 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948).

<sup>93</sup> 167 F.2d 241, 252 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

<sup>94</sup> Judge Charles E. Clark of the Court of Appeals for the Second Circuit and Judge Edgerton of the Court of Appeals for the District of Columbia.

<sup>95</sup> The resolution is now embodied in the Legislative Reorganization Act of 1946, § 121(b)(1)(q), 60 STAT. 828 (1946), which authorizes an investigation of "the extent, character, and objects of un-American propaganda activities in the United States" and "the diffusion within the United States of subversive and un-American propaganda" and related matters.

<sup>96</sup> See the dissenting opinion, *Barsky v. United States*, note 76, *supra*, 167 F.2d at 252, 261, where Judge Edgerton wrote: "The term un-American is completely indefinite. Government counsel do not attempt to define it and concede that they cannot define it. . . . In a literal sense whatever occurs in America is American." The contrary holding of the majority in the *Josephson* and *Barsky* cases was reaffirmed in the *Lawson* and *Morford* cases, notes 76 and 82, *supra*.

<sup>97</sup> *State v. James*, 36 Wash.2d 882, 221 P.2d 482, 487 (1950), which upheld a resolution authorizing the Joint Legislative Fact-finding Committee on Un-American Activities in the State of Washington to "investigate, ascertain, collate and appraise all facts concerning individuals, groups or organizations whose activities are such as to indicate a purpose to foment internal strife, discord and dissension; infiltrate and undermine the stability of our American institutions; confuse and mislead the people, and impede the normal progress of our state and nation either in a war time or a peace time economy."

<sup>98</sup> Legislative Reorganization Act of 1946, § 134(a), 60 STAT. 831-32 (1946). The Act does not give the subpoena power to the standing committees of the House of Representatives, other than the Committee on Un-American Activities. The reason for this difference does not appear in the legislative history, but I am reliably informed that neither the majority nor the minority leaders of the House (Congressmen Martin and Rayburn) wanted its committees to have uncontrolled and permanent subpoena powers.

committee is set forth in the Act only in the section specifying the categories of bills which are to be referred to each. Since that section was not written with investigations in mind, but merely the routing of bills, the wording is general to the ultimate degree; for example, the Committee on Labor and Public Welfare has jurisdiction of "public welfare generally."<sup>99</sup> If language such as this is held to support a criminal prosecution for refusing to answer "pertinent" questions, obviously there will be nothing left of the due process argument based on vagueness in investigatory authorizations.<sup>100</sup>

### *Legislative Authorization and "Pertinence"*

Here we are concerned not with the bounds of legislative investigative power, but with the scope of its delegation to the investigatory agent, whether it be a legislative committee or administrative agency. "Pertinency" is simply another way of expressing the issue of whether a particular question or demand for a document is within the investigatory mission authorized by the legislature.

Formally, therefore, the question is not constitutional but is analogous to statutory construction. Yet the Constitution lurks nearby. Three times the Supreme Court has resorted to narrow construction of investigatory authorizations in order to avoid the constitutional issues which broader interpretation would have raised.<sup>101</sup> The question of pertinence has thus served as a sort of safety valve to relieve the pressure

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<sup>99</sup> Legislative Reorganization Act of 1946, § 102, 60 STAT. 814, 818 (1946). The jurisdiction of the other standing committees is comparably broad: the Committee on Armed Services covers "common defense generally," *Id.* at 815; that on the Judiciary, "civil liberties," *Id.* at 818; and the Committee on Interstate and Foreign Commerce, "interstate and foreign commerce generally," *Id.* at 817.

<sup>100</sup> Although the Legislative Reorganization Act is startlingly vague and general in the light of the modern gloss on the due process clause as applied to criminal statutes, it is not unprecedented in the investigatory field. In 1781, the Virginia House of Delegates empowered several of its standing committees — *e.g.* on religion, courts of justice, and trade — to "send for persons, and records," without further specification or limitation. See Potts, *supra* note 3, at 716.

<sup>101</sup> In the *Rumely*, *American Tobacco*, and *Harriman* cases, *supra* notes 1, 35, and 27, respectively.

of "hot" issues, and there is no reason to assume that it has outlived its usefulness for this purpose.

Quite apart from the constitutional overtones, it seems eminently sound that compulsory investigatory process should be supported by a clear showing that the testimonial demand is purposeful and relevant, and not frivolous or unnecessary to the inquiry. So it seemed to Judge Daly, who first had to grapple with the questions here under discussion.<sup>102</sup> So it has seemed to the judges in numerous subsequent cases that hold the government under the burden of proving pertinency,<sup>103</sup> and without doubt this issue will continue to furnish a solid basis for judicial review of the investigative process.<sup>104</sup>

### *The Fifth Amendment: Privilege Against Self-incrimination*

Although it was questioned in a few old cases<sup>105</sup> whether the constitutional and common-law bar, against requiring a person to give evidence against himself, is applicable to legislative investigations, it was early decided in this country that the privilege is available to witnesses in such investigations.<sup>106</sup>

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<sup>102</sup> In *Briggs v. Mackellar*, 2 Abb. Pr. 30, 65 (N.Y. C.P. 1855), wherein Judge Daly refused to require the witness to answer questions as to the national origin of New York City policemen.

<sup>103</sup> *Bowers v. United States*, 202 F.2d 447 (D.C. Cir. 1953); *United States v. Barry*, 29 F.2d 817 (2d Cir. 1928), *rev'd on other grounds*, 279 U.S. 597 (1929); *United States v. DiCarlo*, 102 F. Supp. 597 (N.D. Ohio 1952); *United States v. Seymour*, 50 F.2d 930 (D. Neb. 1931); *In re Battelle*, 207 Cal. 227, 277 Pac. 725 (1929); *People v. Foster*, 236 N.Y. 610, 142 N.E. 304 (1923); *Matter of Barnes*, 204 N.Y. 108, 97 N.E. 508 (1912); *Shelby v. Second Nat. Bank*, 19 Pa. D. & C. 202 (1933). In the *Bowers* case, *supra* 202 F.2d at 452, the court said: "We seriously doubt whether the 'Do-you-know-a-certain-person' question, without more, can ever be said to be pertinent for the purposes of a criminal prosecution. . . ."

<sup>104</sup> It should be noted that the issues of congressional or committee power thus far discussed do not involve the vexing questions of waiver which arise in connection with the issues of privilege discussed immediately hereinafter. See *Bowers v. United States*, 202 F.2d 447, 452 (D.C. Cir. 1953): ". . . the right to refuse to answer a question which is not pertinent is not a personal privilege, such as the right to refrain from self-incrimination, [sic] which is waived if not seasonably asserted. . . ."

<sup>105</sup> See e.g., *In re Falvey*, 7 Wis. 630, 642 (1858).

<sup>106</sup> *Emery's Case*, 107 Mass. 172 (1871); *People v. Sharp*, 107 N.Y. 427, 14 N.E. 319 (1887); see *Briggs v. Mackellar*, 2 Abb. Pr. 30, 62 (N.Y.C.P. 1855).

This has become the firm rule;<sup>107</sup> legislative committees generally recognize the legal sufficiency of the claim of privilege, and the courts uniformly uphold a claim clearly and seasonably made.

Nevertheless, there is no question currently more controversial than the merits of the privilege against self-incrimination as asserted before congressional committees, and the extra-legal treatment to be accorded those individuals who "plead the Fifth."<sup>108</sup> The legal and ethical issues have been widely discussed in print,<sup>109</sup> and reexamination of the entire complex problem is beyond the compass of this article. But from almost any standpoint, the present situation is highly unsatisfactory, for the following reasons among others:

(1) Because of the technical rules relating to waiver of the privilege, witnesses who might otherwise wish to invoke it only for a few questions are declining to answer almost any questions whatsoever.<sup>110</sup>

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<sup>107</sup> Furthermore, in the light of the provisions of the Smith Act, 18 U.S.C. 2385 (Supp. 1952), a witness may plead the privilege with respect to questions relating to his connection with the Communist Party. *Blau v. United States*, 340 U.S. 159 (1950). For other recent decisions dealing with the Fifth Amendment in legislative investigations, see *Rogers v. United States*, 340 U.S. 367 (1951); *Emspak v. United States*, 203 F.2d 54 (1952), *cert. granted*, 74 Sup.Ct. 23 (1953); *Bart v. United States*, 203 F.2d 45 (1952); *Quinn v. United States*, 203 F.2d 20 (1952); *Aiuppa v. United States*, 201 F.2d 287 (6th Cir. 1952); *United States v. DiCarlo*, 102 F. Supp. 597 (N.D. Ohio 1952); *United States v. Jaffe*, 98 F. Supp. 191 (D.D.C. 1951); *United States v. Raley*, 96 F. Supp. 495 (D.D.C. 1951); *United States v. Fitzpatrick*, 96 F. Supp. 491 (D.D.C. 1951).

<sup>108</sup> The most frequent question has been whether their employment, particularly as teachers, should be continued. Likewise, there has been much debate concerning the factual inferences which the investigating committee is entitled to draw from a plea of the Fifth Amendment. See note 109 *infra*.

<sup>109</sup> Particularly valuable studies are those by Professor Bernard D. Meltzer, *Invoking the Fifth Amendment: Some Legal and Practical Considerations*, 9 BULL. OF ATOMIC SCI. 176 (June 1953), and Professor Sydney Hook, *The Fifth Amendment: A Moral Issue*, N.Y. Times Magazine, Nov. 1, 1953, p. 9. See also Redlich and Frantz, *Does Silence Mean Guilt*, 176 THE NATION 471, (June 6, 1953).

<sup>110</sup> See *Rogers v. United States*, 340 U.S. 367 (1951), including the dissenting opinion of Mr. Justice Black. Such witnesses have been placed in a dilemma which turns the hearings into a battle of legal wits. Recently, for example, a witness before the Senate Permanent Subcommittee on Investigations, who denied that he had committed espionage, was told by the Chairman (Senator McCarthy) that he had thereby waived his right to plead the privilege when asked other questions. N.Y. Times, Nov. 26, 1953, p. 1, col. 3.

(2) Because of the "illusion of investigative omnipotence" and other misunderstandings, witnesses are pleading the Fifth Amendment who are not entitled to, and are not advantaged thereby. Some, who are guilty of no previous reprehensible, let alone criminal conduct, are pleading the privilege out of fear.<sup>111</sup> Others are invoking it from a misguided notion that they are thereby challenging the committees' powers on an issue of principle.<sup>112</sup> I firmly believe that these confusions have been sedulously fostered by subversive organizations, and that their efforts have been facilitated by the unwillingness of so-called "conservative" lawyers to represent or advise witnesses called before the committees. Such reluctance is in no true sense "conservative" and can only be described as the abdication of traditional professional responsibilities.<sup>113</sup>

(3) For the foregoing reasons, the principal purpose of legislative investigating committees in the field of subversion — to wit, the accumulation of information for the guidance of the legislature — is repeatedly frustrated by interposition of the claim of privilege.

(4) This, in turn, leads to a mischievous distortion of the legislative purpose. Some legislators appear to be more anxious to find witnesses who can be forced to plead the Fifth Amendment, than to obtain the information which is thus withheld. Others draw extreme inferences of guilt when the privilege is invoked, thus vitiating the very basis of the Amendment.<sup>114</sup>

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<sup>111</sup> See the letter of Paul Shipman Andrews, Dean Emeritus of the Syracuse University School of Law, in the New York Herald-Tribune Oct. 26, 1953, p. 14, cols. 3-5.

<sup>112</sup> In the very first case holding the privilege available to witnesses before legislative investigations, it was pointed out that the claim "relates to the privileges of the subject, and *not to the authority of any tribunal or body before which inquiry may be made.*" (Emphasis added). *Emery's Case*, 107 Mass. 172, 184 (1871).

<sup>113</sup> By no means do I wish to suggest that there are no circumstances in which a witness before an investigating committee is well advised to plead the privilege against self-incrimination. My comments herein are directed to the abuse and misuse of the claim.

<sup>114</sup> Thus Senator McCarthy is reported to have declared at a public session of his investigating committee, after a witness had invoked the privilege: "We have here

(5) Finally, the combination of all of these factors leads to almost hopeless confusion of the public as a whole, and the employers and friends of privilege-pleading witnesses in particular, concerning the meaning of the plea and the results that should follow in terms of human intercourse.<sup>115</sup>

For the most part, these matters lie outside the area of possible amelioration by means of judicial review under the statutes presently in effect.<sup>116</sup> A more flexible form of judicial review, perhaps better adapted to the present situation, is discussed hereinafter.<sup>117</sup>

A much more fundamental change in the statutory basis, however, is embodied in the bill which passed the Senate at the last session of Congress, authorizing the granting of immunity from subsequent prosecution to witnesses before congressional committees, under specified safeguards.<sup>118</sup> This, of course, would remove the basis for pleading the privilege against self-incrimination after immunity is granted. While many difficult questions are involved<sup>119</sup> in the proposition

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today what would appear to be one of the most active Communist espionage agents we have run down to date." N.Y. Times, Nov. 26, 1953, p. 37, col. 6.

<sup>115</sup> On the one side it is argued that claiming the privilege raises no question of suitability for any employment (as if a policeman accused of graft were to plead the privilege and expect to remain on the force), and on the other that making the claim is sufficient cause for automatic and immediate disbarment for a lawyer, or discharge of a teacher. In *In re Kaffenburgh*, 188 N.Y. 49, 80 N.E. 570 (1907), it was held that claiming the privilege does not constitute grounds for disbarment. See also, *In re Grae*, 282 N.Y. 428, 26 N.E.2d 963 (1940).

<sup>116</sup> I.e., the statute punishing refusal to answer as a misdemeanor, REV. STAT. § 101-104 (1875), as amended, 2 U.S.C. §§ 191-97 (Supp. 1952), and 18 U.S.C. § 3486 (Supp. 1952).

<sup>117</sup> See note 159 *infra*, and accompanying text.

<sup>118</sup> S. 16, 83d Cong., 1st Sess. (1952). The debate on and passage of the bill by the Senate are reported in 99 CONG. REC. 8646-63 (July 9, 1953). In the absence of a statute of this type, legislative committees do not have the power to grant immunity from prosecution. *Doyle v. Hofstader*, 257 N.Y. 744, 177 N.E. 489 (1931).

<sup>119</sup> It is not clear, for example, whether Congress has power to grant immunity from prosecution under state laws. If not, would the privilege continue to be to that extent available, even after a grant of immunity? In *United States v. Murdock*, 284 U.S. 141 (1931) it was held that a witness before a federal tribunal cannot refuse to answer on account of possible incrimination under state law. But where a Senate investigating committee was interrogating a witness about possible violations of state law, it was held that the claim of privilege was available to him. *United States v. DiCarlo*, 102 F. Supp. 597 (N.D. Ohio 1952).



thus embraced, it is in line with existing statutes which give certain administrative agencies the power to grant immunity on a parallel basis.<sup>120</sup> Despite my great respect for many of those Senators who opposed passage of the bill,<sup>121</sup> and provided that the bill is amended by the incorporation of safeguards against "immunity baths" and other abuses, I believe there is good prospect that its enactment into law would do more good than harm.<sup>122</sup>

### *Executive, Judicial, and Other Privileges*

The courts have rarely had occasion to pass on the validity in legislative investigations of claims of privilege other than that against self-incrimination. It has been said, for example, that the attorney-client privilege is of no avail before an investigating committee.<sup>123</sup> But to the best of my knowledge no American court has had occasion to pass on the question,<sup>124</sup> and there appear to be compelling arguments in favor of its

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<sup>120</sup> See, e.g., 48 STAT. 1096 (1934), as amended, 47 U.S.C.A. § 409(1) (Supp. 1953), relating to hearings before the Federal Communications Commission.

<sup>121</sup> The Senators who asked to be recorded as opposed to the bill were Magnuson, Kerr, McClellan, Lehman, Jackson, Stennis, Hennings, Murray, Cooper, and Hayden. The bill in its original and much looser form, as introduced by Senator McCarran, was opposed by the late Senator Robert A. Taft, N.Y. Times, May 7, 1953, p. 17, col. 1. The safeguarding amendments added on the floor were proposed by Senators Kefauver and Morse.

<sup>122</sup> The parallel between a legislative investigating committee and an administrative agency is far from perfect, as the area in which a committee could grant immunity is often much wider than that of any single administrative agency, and elected legislators are prone to deal with these problems on a less judicial and more political basis than an administrative tribunal. On the floor of the Senate S. 16 was amended to require the concurrence of the Attorney-General in the proposed grant of immunity, failing which immunity could not be granted by the committee but only by resolution of the particular house of Congress by a majority yea and nay vote. 99 CONG. REC. 8663 (July 9, 1953). In the absence of this and other safeguards against committee misuse of the power to grant immunity the proposal would be a very dangerous one. But if the power is intelligently and sparingly used, it should help to curb the prevalent misuse of the Fifth Amendment, and speed up clarification of the scope of congressional investigative power.

<sup>123</sup> See *In re Falvey*, 7 Wis. 630, 642 (1858). Also cf. *Ex parte Parker*, 74 S. C. 466, 55 S.E. 122 (1906); *Sullivan v. Hill*, 73 W. Va. 49, 55, 79 S.E. 670, 672 (1913).

<sup>124</sup> Both *Jurney v. MacCracken*, 294 U.S. 125 (1935) and *Stewart v. Blaine*, 1 MacArth. 453 (D.C. 1874) have been cited for the proposition that the attorney-client privilege is inapplicable to legislative investigations, but neither case bears closely on the question.

recognition in legislative as well as judicial hearings.<sup>125</sup> The same is true of grand jury proceedings<sup>126</sup> and the consultations of judges.<sup>127</sup>

In the immediate future, the sharpest controversies loom in the sphere of executive privilege over military, diplomatic, and other confidential matters of state. This brings us back to the constitutional separation of powers. *Quis custodet custodes?* Are the staffs of congressional committees more secure, and better equipped to ferret out subversion, than the counter-intelligence agencies of the executive branch?

Such questions would be precipitated if a congressional committee should seek judicial aid to enforce subpoenas for documents or testimony from government officials who were under instructions from the President not to respond.<sup>128</sup> One may safely predict that the courts will go to great lengths to avoid being caught in a pinch between the legislative and executive branches.<sup>129</sup> In general this will work to the benefit of the executive, since the Congress would be seeking affirmative assistance from the courts, and a negative reaction would leave the information undisclosed in executive hands. In all probability, the courts will not actively assist either the legislative or executive departments to destroy the other branches of government.<sup>130</sup>

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<sup>125</sup> See *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915).

<sup>126</sup> *Opinion of the Justices*, 73 A.2d 433 (N.H. 1950).

<sup>127</sup> See Wyzanski, *supra* note 50, at 99.

<sup>128</sup> So far the executive branch has successfully asserted its right to determine what information of a confidential nature shall or shall not be revealed to the legislature. *Boske v. Commingore*, 177 U.S. 459 (1900); *Ex parte Sackett*, 74 F.2d 922 (9th Cir. 1935); 40 OPS. ATT'Y GEN. 45 (1941); 25 OPS. ATT'Y GEN. 326 (1905). But a claim of privilege by a minor official concerning matters not involving "the security of the State" was rejected in *Opinion of the Judges*, 328 Mass. 655, 102 N.E.2d 79 (1951). Cf. *United States v. Keeney*, 111 F. Supp. 233 (D.D.C. 1953).

<sup>129</sup> The possibilities of acute friction were abundantly demonstrated recently when the Chairman of the House Un-American Activities Committee caused subpoenas to be served on ex-President Truman, Mr. Justice Clark, and Governor James Byrnes of South Carolina. All three refused to comply, on the basis of the separation of powers or, in the case of Governor Byrnes, the division of powers between the federal and state governments. See the N.Y. Times, November 12 (p. 1, col. 5), 13 (p. 1, col. 8; p. 12, col. 7-8; and p. 14, col. 4), and 14 (p. 9, col. 5), 1953.

<sup>130</sup> Landis, *supra* note 3, at 196 declared that Congress "does possess power to

*Judicial Review of Committee Procedures*

Of all facets of the relation between courts and investigating committees, probably the most uncertain and least developed is that of committee procedures. In historical perspective it is easy to see why this is so. In the early days of our republic, legislative investigations were regarded and conducted as informal fact-finding inquiries, for strictly legislative ends. Although from the very outset reputations were at stake on disputed matters of fact,<sup>131</sup> it seems to have been the feeling that lawyers had no necessary place in the proceedings. Committee counsel were unknown,<sup>132</sup> witnesses rarely if ever were accompanied by counsel, and there are several old cases holding that witnesses before legislative committees have no right to counsel.<sup>133</sup>

But by no means does it follow that witnesses, or persons under investigation, were then dealt with more arbitrarily or harshly by the committees than they are today. On the contrary, the atmosphere was, in general, far more courtly, and persons under inquiry were frequently given the right to call and cross-examine witnesses<sup>134</sup> — a privilege almost unheard of today.<sup>135</sup>

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destroy the executive departments," presumably by repealing the statutes and denying the appropriations upon which their existence is predicated and their activities made possible. It might as well be argued that the executive could destroy Congress by calling upon the Army to prevent it from assembling. The system of checks and balances does not rest on logic so much as on common sense. At least one commentator, however, has taken the position that executive privilege to withhold information from the Legislature is narrow or non-existent. See Collins, *supra* note 45.

<sup>131</sup> As in the very first investigation into the causes of and responsibility for General St. Clair's defeat, note 9 *supra*.

<sup>132</sup> I do not know when investigating committees first employed counsel, but the first to establish himself as the sparkplug and spokesman of an investigation was Samuel Untermyer, in the "Money Trust" hearings conducted by the Pujo Committee of the House of Representatives in 1912. 48 CONG. REC. 2382-2419 (1912).

<sup>133</sup> *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 2 N.E. 615 (1885); *In re Falvey*, 7 Wis. 630 (1858).

<sup>134</sup> For example, in the St. Clair investigation, General St. Clair, the Secretary of War, and the Quartermaster were all allowed to call and question witnesses. See ST. CLAIR, A NARRATIVE OF THE MANNER IN WHICH THE CAMPAIGN AGAINST THE INDIANS WAS CONDUCTED IN THE YEAR 1791 UNDER THE COMMAND OF MAJOR GENERAL ST. CLAIR (Phila. 1812). For other examples, see H.R. REP. NO. 160 771

In these circumstances it is hardly surprising that few efforts were made to attack committee procedures, by means of judicial review, until recent years. And for the same reasons, it is natural that, over the course of years, the courts have come to assume that committees are entitled to determine their own procedures, and that they are now extremely reluctant to exercise any degree of judicial review thereof. In the interests of harmonious relations between the legislative and judicial branches there is, to be sure, every reason to commend such restraint.

The procedures of congressional investigating committees are, and always have been, entirely unregulated by statute or rule. Current abuses have now produced a flood of proposals for "codes" to govern committee procedures.<sup>136</sup> Analysis of these is beyond the scope of this paper, but several comments are relevant to the relation between committees and courts. The more elaborate and restrictive of these codes might be useful for congressional self-discipline, but if intended to be mandatory and to endow witnesses and persons under investigation with legal rights, they would raise extremely difficult problems from the standpoint of judicial review.<sup>137</sup> Many

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Cong., 1st Sess. 153, 292 (1832); H.R. REP. NO. 502, 22d Cong., 1st Sess. 48-49 (1832); SEN. REP. NO. 205, 36th Cong., 1st Sess. 39 (1860).

<sup>135</sup> As late as 1924, witnesses before the Brookhart-Wheeler Committee investigating the Department of Justice were cross-examined by counsel representing Attorney-General Daugherty. See *Hearings before Select Committee on Investigation of Attorney General on Investigation of Hon. Harry M. Daugherty under S. RES. 157, 68th Cong., 1st Sess. (1924)* 6, 233. See Frankfurter, *supra* note 43, at 331; "Our course, the essential decencies must be observed, namely opportunity for cross-examination must be afforded to those who are investigated or to those representing issues under investigation. Despite Daugherty's statement to the contrary, that opportunity has been scrupulously given by the Brookhart committee."

<sup>136</sup> See, e.g., Fortas, *supra* note 55; Keating, *Code For Congressional Inquiries*, N.Y. Times Magazine, April 5, 1953, p. 10, and his proposal to amend the House rules, embodied in H. RES. 29, 83d Cong., 1st Sess. (1953); Congressman Javits' proposals are reported in the N.Y. Times, Nov. 6, 1953, p. 13, col. 3; Congressman Freylinghuysen's proposals publicly announced November 21, 1953, (press release).

<sup>137</sup> This would be especially true of rules authorizing persons publicly criticized in committee hearings to call and cross-examine witnesses, proposed in Congressman Keating's resolution, *supra* note 136, and the even more sweeping proposals of Mr. Fortas, intended to protect witnesses from being surprised by documentary evidence in the hands of the committee.

matters which are most susceptible to abuse must remain within the discretion of the committees,<sup>138</sup> and constant judicial intervention, in the course of which the committees would increasingly appear in the role of inferior tribunals, would inevitably cause friction between Congress and the courts.

Furthermore, to a considerable degree these codes are based on the assumption — erroneous, I believe — that a legislative investigating committee can be made to resemble and operate like a judicial tribunal.<sup>139</sup> All the statutes, rules, and regulations in the world can not accomplish this transmigration of the legislative to the judicial soul, and it is a mistake to try.<sup>140</sup> Indeed, one of the dangers of these far-reaching proposals for “reform” of procedures is that, in the event of their adoption, the public would conclude that committee hearings had been turned into real trials, in the course of which guilt or innocence might be established.<sup>141</sup> It would, I

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<sup>138</sup> Certainly the publicity given to accusations against individuals by “committee witnesses,” without opportunity for a reply by the victim, manifests one of the most flagrant and prevalent abuses. The rule proposed by Congressman Keating for opportunity to call witnesses in behalf of the accused, however, leaves “the extent to which this privilege may be availed of . . . to the discretion of the committee.” *Supra* note 136.

<sup>139</sup> Indeed, Congressman Freylinghuysen stated that he wished to develop “a code outlining the rights of witnesses and assuring them protections similar to those they would receive in a court of law.” Mr. Fortas’ suggestions, *supra* note 55, are based on the premise, with which it is difficult to disagree, that the investigating committees and loyalty boards are today a much more frequented arena for the scrutiny of loyalty than the courts; therefore, he maintains, the committees should not be “outside the law.” Much as I agree with the diagnosis, I have little faith in Mr. Fortas’ cure, which is to try to turn the committees into the equivalent of judicial tribunals.

<sup>140</sup> Congressmen are elected politicians, whose duty it is to take into account the most varied and often conflicting views and pressures in the process of election and legislation. Judges are under a duty to be non-political, and to exclude matters from the field of decision in accordance with legal practice. It is a total incompatibility, not of person but of function, that renders futile and unwise any effort to assimilate a committee to a court. This does not mean that committees should not function as fairly as possible, but it does mean that investigating committees should not be expected to ascertain facts as they bear on individual rights and liabilities.

<sup>141</sup> Mr. Fortas’ recommendations, *supra* note 55, at 45, even include rules for the evaluation or rejection of evidence. Hearings on loyalty accusations, he proposes, should be based only on evidence of “activities inimical to the United States” within three to five years prior to the hearing, and evidence relating to membership in “Communist-front” organizations, prior to their “official” recognition as such, should be excluded, unless the accused was within the “control group.”

believe, be far more useful for Congress to reaffirm that its investigations are *not* trials, and to adopt as legally mandatory a few simple and basic reforms such as those suggested by Judge Wyzanski.<sup>142</sup>

Apart from the proposed "codes," there are two procedural matters of particular current importance. The intense publicity which has attended some hearings, involving batteries of newsreel photographers and television cameras, has raised the question whether a witness has a legal basis for objecting to any or all of these paraphernalia. In a recent case in which two witnesses were prosecuted for refusing to answer questions at a hearing of the Kefauver committee, justifying their refusal by the concomitant disturbances, District Judge Schweinhaut dismissed the indictments.<sup>143</sup> He found that no constitutional question was involved, but was of the opinion that because of "the concentration of all these elements" calculated "to disturb and distract any witness," a refusal to testify could not be deemed "wilful" and was "justified."<sup>144</sup> On the facts as found,<sup>145</sup> the decision seems to me correct and a healthy development in judicial review of investigations. I do not, however, share the views of some that the televising of congressional investigative hearings should not be permitted,<sup>146</sup> and I do not believe that the courts will lay down any such prohibition.

The other problem is that presented by the trend toward *in camera* investigative hearings. Certainly these "executive

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<sup>142</sup> Wyzanski, *supra* note 50, at 106-08, proposes the following three procedural requirements: (1) the witness may have counsel present at the hearing, (2) he may file a written statement, and (3) an accurate record of the proceedings shall be kept.

<sup>143</sup> *United States v. Kleinman*, 107 F. Supp. 407 (D.D.C. 1952).

<sup>144</sup> *Id.*, 107 F. Supp. at 408. In the statute, REV. STAT. § 102 (1875), as amended, 52 STAT. 942 (1938), 2 U.S.C. § 192 (1946), the word "willfully" is grammatically related to a failure to appear, rather than to a refusal to answer, once present.

<sup>145</sup> It should be noted that Judge Schweinhaut did *not* hold that the presence of television cameras alone would have required dismissal of the indictment but relied on the entire concatenation of microphones, flash bulbs and cameras.

<sup>146</sup> The question is a complicated one, and has been much debated. See Arnold, *Trial by Television*, 187 ATLANTIC MONTHLY 68 (June, 1951), and Taylor, *The Issue is not TV, but Fair Play*, N.Y. Times Magazine, April 15, 1951, p. 12.

sessions" have their *bona fide* uses, when the subject matter raises security problems, or to permit the committees to follow up leads and examine witnesses without the glare of publicity.<sup>147</sup> As long as the hearings are truly *in camera*, the potential benefits probably outweigh the abuses.<sup>148</sup> However, a new type of hearing, neither secret nor public, is currently being exploited. Press and public are excluded, although specially invited guests may be present, and at the end of the hearing the Chairman, or members of the committee or its staff, give the press their version of what has occurred.<sup>149</sup> Outrageous as is this mongrel proceeding, it is not clear that it can be checked by judicial review, and probably rectification must be left to Congress itself.<sup>150</sup>

### *The Form of Judicial Review of Legislative Investigations*

Before the passage of criminal statutes dealing with reculant witnesses before investigating committees, the committees' authority to compel testimony was usually tested either by a petition for *habeas corpus* after a finding of contempt and incarceration of the witness, or by an action for trespass and false imprisonment against the sergeant at arms or other

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<sup>147</sup> In *In re Leach*, 197 App. Div. 702, 189 N.Y. Supp. 352 (1st Dep't. 1921) it was held that a legislative committee has no power to take testimony *in camera*. This ground of the decision, however, was not affirmed by the Court of Appeals, 232 N.Y. 600, 134 N.E. 588 (1922), and there is, to the best of my knowledge, no other judicial support for such a restriction.

<sup>148</sup> See Congressman Keating's speech, at the Cornell Law Association, May 15, 1953, wherein it was proposed that executive sessions be held only after approval in each instance by a majority of the committee, in order to avoid "grave abuses as a Star-Chamber examination, to probe a witness and break him down as a mere prelude to exposing him to public scrutiny in an open session."

<sup>149</sup> See the press accounts of the "executive" hearings of the Senate Permanent Investigating Subcommittee concerning alleged espionage at Fort Monmouth, N. J., and at the General Electric Co.'s plants, reported in the N.Y. Times, e.g., on October 17, 18, 21, 24, 28, and 31, and November 7, 13, 14, 17 and 19, 1953.

<sup>150</sup> Prohibitions against this perversion of the investigatory process might well be included in proposed reforms of investigative procedures by statute or rule. Likewise, it has been argued that procedural abuses "which hold little promise of compensating advantage to the governmental process" are violations of due process. Note, 26 TULANE L. REV. 381, 386-88 (1952).

enforcing officer of the legislature.<sup>151</sup> Both are clumsy and, by now, obsolete devices,<sup>152</sup> and today criminal prosecutions under statutes punishing the failure to honor committee process are the almost invariable form of judicial review.

Despite this popularity, the criminal process leaves much to be desired. The purpose of a legislative inquiry is to obtain information; prosecution does not achieve this end directly or efficiently but, if at all, slowly and uncertainly *in terrorem*. Thus the committee's objectives are not well served. Furthermore, a witness who is genuinely doubtful whether the committee has authority to require him to reply, must stake his judgment against the risk of conviction and imprisonment. As the Supreme Court has bluntly warned, the witness "was either right or wrong in his refusal to answer, and if wrong he took the risk of becoming liable to the prescribed penalty."<sup>153</sup>

In view of the numerous, complex, and doubtful questions of power, privilege, and procedure scanned above, this seems an unconscionable hazard, particularly since the legislature's ends are not thereby furthered.<sup>154</sup> Where the constitutionality of state statutes or the validity of executive action can only be tested at the risk of criminal liability or other irreparable injury, the federal courts have invoked their equity powers to make possible a safe test by injunctive proceedings.<sup>155</sup>

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<sup>151</sup> There have also been taxpayers' suits to enjoin the expenditure of government funds for allegedly unauthorized investigations. See, e.g., *Greenfield v. Russel*, 292 Ill. 392, 127 N.E. 102 (1920), and *State v. Frear*, 138 Wis. 173, 119 N.W. 894 (1909).

<sup>152</sup> The suit for damages does not protect the immediate interest of either the witness or the legislature. The contempt proceeding requires hailing the witness before the bar of the legislature, and imprisonment of a witness cannot endure beyond the end of the legislative session.

<sup>153</sup> *United States v. Murdock*, 290 U.S. 389, 397 (1933). See also *Eisler v. United States*, 170 F.2d 273, 280 (D.C. Cir. 1948): "A person summoned to appear before a Congressional committee may refuse to answer questions and submit to a court the correctness of his judgment in doing so, but a mistake of law is no defense, for he is bound to rightly construe the statute involved."

<sup>154</sup> No doubt this is one reason so many witnesses have pleaded the privilege against self-incrimination.

<sup>155</sup> *Ex parte Young*, 209 U.S. 123 (1908); see Frankfurter, *The Federal Courts*, 58 NEW REPUBLIC 273 (April 24, 1929).



Logically the same considerations should apply to legislative action when, as in investigations, it operates directly on individuals. And in fact there is considerable authority for the issuance of injunctions to enjoin unauthorized proceedings by investigating committees.<sup>156</sup> Conceivably this view might win more authoritative endorsement where a governmental body is the petitioner, and there is a very strong basis for equitable jurisdiction, perhaps to prevent multiplicity of suits.<sup>157</sup> But the federal courts are not habituated to checking legislative proceedings, and it seems most improbable that injunctive process will be held available to review investigative process.<sup>158</sup>

But should there not be some form of action, both speedier and less hazardous than criminal proceedings, to test and enforce investigatory process?<sup>159</sup> I so believe, and a familiar form of proceeding, amply tested and supported by abundant precedent, is ready to hand. It was first evolved for the benefit of administrative agencies (which, of course, have no contempt power), to enable them to compel testimony by applying for a court order, disobedience to which is punished by the court as a contempt. This is now a standard form of judicial proceeding in connection with administrative agencies, which has been upheld and applied by the courts in many

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<sup>156</sup> *United States v. Owlett*, 15 F. Supp. 736 (M.D. Pa. 1936); *Annenberg v. Roberts*, 333 Pa. 203, 2 A.2d 612 (1938); *Shelby v. Second Nat. Bank*, 19 Pa. D. & C. 202 (1933); *cf.* *Brown v. Brancato*, 321 Pa. 54, 61, 184 Atl. 89, 92 (1936). The same has been held, and injunctions issued, when the legislative investigative power was exercised through an executive agency. *FTC v. Claire Furnace Co.*, 285 Fed. 936 (D.C. Cir. 1923); *Attorney General for the Commonwealth of Australia v. The Colonial Sugar Refining Co.*, [1914] A. C. 237 (P.C. 1913). And injunctions have been granted to restrain a witness from responding to committee process. *Strawn v. Western Union Tel. Co.*, 3 U.S.L. WEEK 646 (D.C. March 11, 1936); *cf.* *United States v. Groves*, 18 F. Supp. 3 (W.D. Pa. 1937).

<sup>157</sup> Such were the circumstances in *United States v. Owlett*, 15 F. Supp. 736 (M.D. Pa. 1936).

<sup>158</sup> *Hearst v. Black*, 87 F.2d 68 (D.C. Cir. 1936); *cf.* *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

<sup>159</sup> In some New York State investigatory proceedings the witness may move to quash the subpoena. *Carlisle v. Bennett*, 268 N.Y. 212, 197 N.E. 220 (1935). Such an action was recently but unsuccessfully attempted in a federal district court in San Francisco. *N.Y. Times*, Nov. 28, 1953, p. 9, col. 4.

cases.<sup>160</sup> It is entirely adaptable to legislative committee investigations,<sup>161</sup> and in fact has at least twice been authorized for joint investigating committees of the two houses of Congress.<sup>162</sup> Utilization of this procedure today, in place of criminal prosecution, would give investigating committees speedy and direct compulsory process, would relieve witnesses of the grave and unnecessary hazards which now attend the testing of legal questions, and the overall result, in Congressman Keating's words, "would be salutary for everyone concerned."<sup>163</sup>

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<sup>160</sup> The process was held unconstitutional, on the ground that judicial functions were not involved, in *In re Pacific Ry. Comm'n*, 32 Fed. 241 (C.C.N.D. Cal. 1887), but was upheld, on the ground that the court would review the agency's legal authority to obtain the information, in *ICC v. Brimson*, 154 U.S. 447 (1894). Such proceedings were involved in the *Harriman*, *American Tobacco*, and *Jones* cases, *supra* notes 27, 35, and 38 respectively.

<sup>161</sup> In the absence of express authorization, congressional committees have no power to institute legal proceedings. *Reed v. County Commissioners*, 277 U.S. 376 (1928); *cf. Ex parte Frankfeld*, 32 F. Supp. 915 (D.D.C. 1940); *In re Davis*, 58 Kan. 368, 49 Pac. 160 (1897).

<sup>162</sup> H.J. RES. 237, 68th Cong., 1st Sess., 43 STAT. 461-62 (1924), to investigate land grants to the Northern Pacific Railroad; H.J. RES. 103, 61st Cong., 2d Sess., 36 STAT. 871-72 (1910), to investigate the Departments of Interior and Agriculture.

<sup>163</sup> See his speech of May 15, 1953 before the Cornell Law Association. The enormous expansion of this type of litigation underlines the desirability of the change; from 1857 to 1949 there were 113 prosecutions under the criminal statute; from 1950 to June, 1952 there were 117. See *Quinn v. United States*, 203 F.2d 20, 37 n. 100 (D.C. Cir. 1952). If legislation providing for the granting of immunity from prosecution is not enacted, the changed mode of enforcement would mitigate the vexing problem of "waiver." Substantially the same proposal as the one advanced in the text above and by Congressman Keating, was made in 1930 by John T. Flynn in his article *Senate Inquisitors and Private Rights*, 161 HARPER'S 357 (Aug. 1930).

Judge Wyzanski has opposed this or "any other broadening of judicial review" as "ill-advised." See Wyzanski, *supra* note 50, at 105. His principal objection is that "a witness in a trial court is not allowed thus to interrupt the progress of a case by appealing a ruling on evidence or procedure." But a legislative investigation is not a trial court, is not empowered to decide "cases," and has no appellate superstructure. The critical difference is that a witness in court who objects to a question does get an immediate judicial (though not appellate) determination of his rights. And if the witness thereafter is recalcitrant, the judge's sentence for contempt is primarily intended to induce the witness to purge himself by answering, whereas the criminal proceeding under REV. STAT. §§ 101-104 (1875), as amended, 2 U.S.C. §§ 191-94 (1946), has no such effect. With all respect, I think that Judge Wyzanski's objections are unconvincing.

*Conclusion*

In summary, judicial review of the legislative investigative process is not, as many have imagined in recent years, evanescent or insubstantial. The courts have asserted a very solid power of review, and they will continue to do so. They will dispose of questions under the Bill of Rights by adjusting the interlocked policies of freedom and security, case by case. Out of respect for a coordinate branch of government, they will be reluctant to supervise committee procedures, and they will not, except in very clear cases, declare an entire inquiry to be outside the scope of legislative power. But for all this traditional and well-grounded restraint, the self-aggrandizement and dictatorial tactics of the investigators will arouse judicial misgivings and provide more frequent occasion for judicial intervention.<sup>164</sup>

I have indicated a few areas in which new legislation can improve the legislative-judicial relation in the investigative field, and thereby enable the courts to contribute more speedily and effectively to the processes of government. These include statutes which would: (1) enable witnesses before legislative investigations to be granted immunity from subsequent prosecution, subject to necessary safeguards against "immunity baths"; (2) facilitate and expedite judicial review of questions raised concerning the power and procedures of investigative committees and the privileges of witnesses before them; and (3) reaffirm the essentially legislative and non-judicial character of investigatory hearings, and lay down a few simple procedural requirements for their conduct.

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<sup>164</sup> Cf. Frankfurter, *supra* note 43, at 331: "The procedure of Congressional investigations should remain as it is. No limitations should be imposed by congressional legislation or standing rules. The power of investigation should be left untrammelled." See *United States v. Rumely*, 345 U.S. 41, 44 (1953), *per* Mr. Justice Frankfurter: "... we would have to be that 'blind' Court, against which Mr. Chief Justice Taft admonished in a famous passage, *Child Labor Tax Case*, 259 U.S. 20, 37, that does not see what '[a]ll others can see and understand' not to know that there is wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation."

Since the congressional investigation is a legislative device, it is impossible to eliminate its chronic susceptibility to political exploitation. For the same reason, we cannot put our sole or even principal reliance on judicial review as a means of controlling if not curing the disease. "Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."<sup>165</sup> But the pillars of society are mutually supporting; when the judge firmly and dispassionately declares the law, it aids the citizen to combat lawlessness.

Nothing is more dangerous to society, or more helpful to the Communists, than that high officials, elected or appointed, should openly display their contempt for law.<sup>166</sup> Nothing, that is, unless it be the failure of other officials and of the citizenry to insist upon the law's vindication. Therefore, the issues and abuses with which this symposium is concerned are in no way partisan. When we are talking of the basic social verities such as respect for law and regard for truth, there is no room for any outlook but conservatism. Republicans and Democrats, conservatives and liberals, must all stand on conservative ground, and set their faces squarely against the radical and destructive mischief of these latter-day "Know-Nothings," of whatever party, who sow suspicion and fear in our land at a time when foreign perils urgently require that we be of one mind on the fundamentals of our way of life.

Those who think to profit by investigative excesses and abuses are the extremists of both left and right, and some among them are despicably attempting to give a religious and racial cast to loyalty investigations.<sup>167</sup> In the heat of sensa-

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<sup>165</sup> Mr. Justice Frankfurter, in *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

<sup>166</sup> See *N.Y. Times*, Oct. 29, 1953, p. 23, col. 1. Replying to a statement by the Hon. John J. McCloy, Senator McCarthy was reported as saying that he did not "give a tinker's dam what the bleeding hearts [sic] say" about his investigative methods.

<sup>167</sup> Such as was the inevitable tendency of the charges of widespread disloyalty among Protestant clergymen that recently emanated from members or staff members of the committees headed by Senator McCarthy and Congressman Velde.

tional charges and counter-charges, it calls for tough minds and cool heads to avoid these ugly pitfalls. It is earnestly to be hoped that no religious or racial group or profession will fall into the error of condemning the investigative process as such, or claiming immunity from its reach, out of indignation at its abuse. But the committees are within the law, not above it, and it would be tragic if any religious or racial group should be led into the false position of condoning contempt for law, or supporting the transgressions and excesses of irresponsible politicians who are discrediting the investigative process in order to advance their own ambitions.

In summary, the fact that some individuals called before the committees may indeed be disloyal or worse, merely emphasizes that open contempt for their legal rights is a greater threat to the liberties of every loyal citizen than anything these people could accomplish. Congressional investigations can and should be a powerful shield to our free institutions, and it is the task of everyone — judges, legislators, government officials and all foresighted citizens — to join in restoring them to the beneficial fulfillment of their governmental role, under the leadership of able, moderate and responsible members of the House and the Senate.<sup>168</sup> Such leadership has never been so needed as it is today, and its reassertion would be the best way to resolve and dissolve the problems which have given rise to this symposium.

*Telford Taylor*

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<sup>168</sup> To achieve this end, serious consideration should be given to Congressman Peter Freylinghuysen's recent proposal (*supra*, note 136) to establish a non-partisan joint committee on internal security, to replace the numerous committees (including those headed by Senators Jenner and McCarthy and Congressman Velde) presently investigating subversive activities.